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EXAMINER

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/849,509
Filing Date: May 19, 2004
Appellant(s): MUDGE, LAURENCE C.

Arnold I. Rady
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 12/17/09 appealing from the Office action mailed 7/8/08.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The following are the related appeals, interferences, and judicial proceedings known to the examiner which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal:

Bayer CropScience LP v. Tessenderlo Kerley, Inc. and Phoenix Environmental Care, LLC. Civil Action No.: 1:09-cv-833.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

Art Unit: 1616

5,336,661	LUCAS	08-1994
5,206,228	COLLINS	04-1993
JP 02138376	KATO ET AL	05-2006
JP 03221576	NAGASHIMA ET AL	09-1991

Guillino et al., "Chemical control of dollar spot and brown patch of turfgrass in Italy, Mededelingen - Faculteit Landbouwkundige en Toegepaste Biologische Wetenschappen, Universiteit Gent, 1995, 60, 2b Proceedings, 47th International Symposium on Crop Protection, pt. 2, 1995, 367-70.

Fenn et al., Studies on the In Vitro and In Vivo Antifungal Activity of Fosetyl-Al and Phosphorous Acid, Phytopathology, 74 (5), pp. 606-11.

Printout of <http://www2.siri.org/msds/f2/bzz/bzzsc.html>, for ingredients in Rohm and Haas Co.'s FORE.TM. FUNGICIDE, 62440 (7/24/1991).

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-8, 10-17, 20-35, 37 and 38 are obviousness over **Lucas 5,336,661 (8/94: filed 10/91)**, **printout of** <http://www2.siri.org/msds/f2/bzz/bzzsc.html>, for ingredients in Rohm

Art Unit: 1616

and Haas Co.'s FORE.TM. FUNGICIDE, 62440 (7/24/1991) and **Collins 5,206,228 (4/93).**

Lucas teaches (see examples 1-8) using on turfgrass fungicidal treatment formulations comprising:

a. 1 part by weight of certain monoester salts of phosphorous acid, for example fosetyl-Al (preferably Aliette.TM.) and

b. 1.5 to 2.5 parts by weight of mancozeb (preferably FORE.TM.).

The FORE.TM. brand of mancozeb contains 70% mancozeb and 1-2% of copper phthalocyanato(2-) which is a phthalocyanine compound also known as Pigment Blue 15. See <http://www2.siri.org/msds/f2/bzz/bzzsc.html>, for ingredients in Rohm and Haas Co.'s FORE.TM. FUNGICIDE, 62440.

Accordingly, Lucas teaches turfgrass formulations comprising:

a. 1 part of certain monoester salts of phosphorous acid, for example fosetyl-Al (preferably Aliette.TM.) and

b. 1.5 to 2.5 parts of mancozeb (preferably FORE.TM.) and

c. < 1 part by weight of Pigment Blue 15 as the phthalocyanine compound.

The Lucas ALIETTE and FORE formulations comprising the above ingredients realized significant improvements in turf color as compared to other Mancozeb containing formulations lacking Pigment Blue 15. See col. 5-6. Lucas further teaches the use of its compositions as "wetable powders" (as in instant claim 21 and 38) and "aqueous suspensions" (as in instant claims 20 and 37). See Lucas col. 3.

The Lucas reference composition and method differs from the instant claims insofar that it fails to teach:

a. the substitution of the anti-fungal agent mancozeb with a different antifungal agent such as phosphorous acid or alkali/alkaline earth metal salt thereof (for all the instant

Art Unit: 1616

claims) In this regard, it is noted that mancozeb is an ethylenebisdithiocarbamate fungicide excluded from the instant claims;

b. the substitution of Pigment Blue 15 with a different phthalocyanine compound (only instant claims 4, 17, 27 and 35).

Collins teach the anti-fungal use of BOTH monoester salts of phosphorous acid AND phosphorous acid or alkali/alkaline earth metal salt thereof for the added benefit of controlling arthropod pests when applied to plants including turf. See Abstract; patent claims 1-18, including claim 9 drawn to turf; and col. 10. Collins additionally teaches, interchangeably, the further incorporation of various colorants into its plant treatment formulations including metal phthalocyanine dyestuffs. See col. 12, especially lines 10-22.

Accordingly, one of ordinary skill in the art at the time of applicant's invention would have been motivated to modify the Lucas reference turf treating composition containing mancozeb to substitute the Collins reference phosphorous acid or alkali/alkaline earth metal salt since they both possess analogous anti-fungal activities with the added benefit of increase pesticide resistance found in the Collins phosphorous acid or alkali/alkaline earth metal salt fungicide.

Additionally, Collins provides motivation to one of ordinary skill in the art to substitute one functionally equivalent phthalocyanine compound for another i.e. substitute the use of Pigment Blue 15 with a different phthalocyanine dye compound.

Thus, it would have been prima facie obvious to one of ordinary skill in the art at the time of filing of the instant claimed invention to substitute the Lucas' mancozeb fungicide with the Collins phosphorous acid or alkali/alkaline earth metal salt thereof

Art Unit: 1616

fungicide for added pesticide resistance as taught by Collins and where necessary substitute a different phthalocyanine dye for Pigment Blue 15 in the Lucas composition to attain analogous colorant properties as taught by Collins.

(10) Response to Argument

Appellants argue that the Examiner does not address Appellants' commercial SIGNATURE trademark product which the Appellants presented in an interview to the Examiner. The SIGNATURE trademark product contains fosetyl-Al and phthalocyanine, but no mancozeb. See Appeal Brief, page 11.

The Examiner argues that the Appellants' SIGNATURE trademark product has been considered. The SIGNATURE product does not satisfy a showing to overcome the 35 USC 103 rejections of record. Thus, the SIGNATURE product does not demonstrate that the phthalocyanine alone possesses antifungal activity. In addition no evidence is provided showing that phthalocyanine addition to fosetyl-Al synergistically enhances the fungicidal activity of fosetyl-Al. It is already established by the art rejections of record that fosetyl-Al is a fungicide. Therefore, the Examiner's argument is that all the fungicidal activity provided by the SIGNATURE product is derived from the fosetyl-Al, not the phthalocyanine. Furthermore, Lucas makes it clear that the FORE trademark product is used as the source of mancozeb, not the SIGNATURE trademark product.

The Appellants argue that phthalocyanine does not only function as a colorant, but also acts to synergize certain fungicides (See Appeal Brief pages 11-12). The colorant functions as an active agent (Appeal Brief page 15).

The Examiner argues that Appellants have provided no evidence to support this statement. It is well known in the art that phthalocyanine is a dye and functions to add color. Appellants provide no data demonstrating the activity of the fungicide (fosetyl-Al) alone, phthalocyanine alone and a fosetyl-Al plus phthalocyanine mixture. Such results

Art Unit: 1616

would assist in determining if phthalocyanine fungicidally synergizes fosetyl-Al. The Examiner agrees that the colorant is an active agent in the sense that it provides color.

The Appellants argue there is no motivation to arrive at the instant invention comprising instant phosphorous compounds and phthalocyanine compound (Appeal Brief page 15).

The Examiner argues there is no direct teaching away of using phthalocyanine compounds with instant phosphorous compounds. The Examiner reiterates that one of ordinary skill in the art at the time of applicant's invention would have been motivated to modify the Lucas reference turf treating composition containing mancozeb to substitute the Collins reference phosphorous acid or alkali/alkaline earth metal salt since they both possess analogous anti-fungal activities with the added benefit of increase pesticide resistance found in the Collins phosphorous acid or alkali/alkaline earth metal salt fungicide. Additionally, Collins provides motivation to one of ordinary skill in the art to substitute one functionally equivalent phthalocyanine compound for another i.e. substitute the use of Pigment Blue 15 with a different phthalocyanine dye compound. Thus, it would have been prima facie obvious to one of ordinary skill in the art at the time of filing of the instant claimed invention to substitute the Lucas' mancozeb fungicide with the Collins phosphorous acid or alkali/alkaline earth metal salt thereof fungicide for added pesticide resistance as taught by Collins and where necessary substitute a different phthalocyanine dye for Pigment Blue 15 in the Lucas composition to attain analogous colorant properties as taught by Collins.

Appellants argue that the rejection did not give weight to the term "synergistic" recited in the claims, and therefore, the rejection is in error. Appellants argue the instant claims require the phosphorous acid component plus phthalocyanine compound to be present in a synergistically effective amount to achieve a fungicidal composition

Art Unit: 1616

enhancing turf grass quality. The synergistic property is expressed in the instant claims and therefore claims cover a composition and method that yields a turf grass quality and fungi control that would be unobvious to an artisan in the field from a mixture of phthalocyanine dye colorant and fungicidal phosphorous acid component. The Appellants further argue that the phthalocyanine acts to synergize/enhance the effectiveness of the phosphorous acid fungicide. See Appeal Brief, page 25.

The Examiner argues that weight was given to the term "synergistic" recited in the instant claims. The Examiner argues that the amounts of phosphorus compound and phthalocyanine compound used in Lucas (1 part fosetyl-Al and > 1 part pigment blue) overlaps those amounts recited in the instant claims 1-3 (1 part phosphorous compound, e.g. fosetyl-Al and 0.01 to 0.1 parts phthalocyanine compound). Because of this overlap, both the prior art and instant invention would automatically impart the same or similar chemical and physical properties (including synergism if present) to the composition. Furthermore, the claims are not commensurate in scope with the Examples yielding unexpected results in the specification, i.e. the Examples in the instant specification require mancozeb, which is not recited in the instant claims. Thus, the Examiner reiterates that claims are not commensurate in scope with the Examples recited in the instant specification. The Examiner maintains that no evidence is provided in the application supporting that the addition of phthalocyanine to the phosphorous acid fungicide synergizes the phosphorous acid fungicide. In fact, Appellants do not provide data showing that phthalocyanine functions in any other manner than a colorant. The Appellants makes claim to the synergy for the combination, but no proof of synergy for the combination of phthalocyanine and phosphorous acid fungicide is provided by the Appellants.

Art Unit: 1616

Appellants argue that the Examiner violated the fundamental legal principle that an inventor's own discovery cannot be used as prior art against him. Appellants argue that the Examiner is applying hindsight in the evaluation of the prior art by relying upon Mudge's own disclosure. See Appeal Brief, pages 29-30. The Mudge '804 patent states that the improvements in turf color and turf quality occurred as a result of applying a composition comprising ALIETTE(TM) + FORE(TM) to the turf. ('04 Patent 9:26-30, 60-65). This reflects control of fungal disease. The Appellants refer the Examiner to Mudge '804 Table 3 to support that phthalocyanine compound "Pigment Blue 15" in FORE enhance the activity and effects of the fosetyl-Al + mancozeb (FORE) mixture compared to fosetyl-Al + mancozeb formations lacking Pigment 15. Appellants also refer the Examiner to Table 1 wherein it is indicated that an improvement in turf quality and color were observed for ALLIETTE™ + FORE™ containing phthalocyanine over ALLIETTE™ + MANZATE(TM) containing no phthalocyanine. The Appellants conclude that the results suggest that Pigment Blue 15 enhances the activity of the ALIETTE™ plus MANCOZEB™ in a synergistic interaction. See Appeal Brief, pages 12-13.

The Examiner reiterates that the results referred to by the Appellants in Tables 1 and 3 all include the active mancozeb which is excluded from the instant claims. Note, FORE™ contains mancozeb, and MANZATE™ includes mancozeb. The mancozeb is included in the Examples of Tables 1 and 3, but mancozeb is excluded from the instant claims by the language wherein the invention does not include an ethylenebisdithiocarbamate contact fungicide. Appellants provide no data supporting that the claimed invention comprising phthalocyanine plus phosphorous acid fungicide, without an ethylenebisdithiocarbamate contact fungicide, produces synergism. Based on this analysis the Examiner is neither violating the legal principle that an inventor's own discovery cannot be used against him nor is the Examiner applying hindsight to reconstruct Appellants' invention by relying upon the Mudge '804 disclosure.

Appellants argue that the Examiner is incorrect in asserting that the Lucas '661 patent discloses Pigment Blue 15 as a separate ingredient of the turfgrass composition and giving Pigment Blue 15 equal status to mancozeb and the phosphorous acid compound actually recited in Lucas '661. See Appeal Brief, pages 30-33. The Appellants argue that the rejection of the instant invention over Lucas '661 and Collins '228 should be reserved. The Lucas '661 patent describes and claims an invention

Art Unit: 1616

involving a synergistic combination of a monoester salt of a phosphorous acid (ALLIETTE™) plus a metallic ethylene bisdithiocarbamate fungicide (FORE™). See Appeal Brief, pages 33-38. In the Rohm and Haas' printout, FORE™ is defined to contain mancozeb plus phthalocyanines, namely "Pigment Blue 15." The Collins '228 patent does not provide any instance where ALIETTE™ or any other phosphorous acid compound was combined with phthalocyanines. Appellants further argue that the Collins '228 patent is directed to phosphorous acid and derivatives thereof to control arthropods in the area or locus of plants. Collins list of additives include phthalocyanine among numerous classes of colorants with no preference for phthalocyanine. None of the Examples in Collins combines a colorant with the phosphorous acid fungicide. In Collins list of synergist for phosphorous acid fungicide, a colorant is not mentioned. See Appeal Brief, pages 18-22.

The Examiner is not asserting that Lucas '661 patent recites that Pigment Blue 15 as a separate ingredient of the turfgrass, and the Examiner is not giving Pigment Blue 15 equal status to mancozeb and the phosphorous acid compound actually recited in Lucas '661. The Examiner reiterates that the rejection above makes the combination of Lucas '661 and Collins '228 obvious since both inventions individually have the utility of controlling fungicides on plants. Furthermore, Collins '228 is not required to exemplify the combination of phthalocyanine with the phosphorous acid fungicide compound in order to make the combination obvious. The point to be made is that the list including phthalocyanine in Collins '228 is finite and that Collins suggests that compounds such as phthalocyanine can be added to the phosphorous acid fungicide. Based on these facts, it would have been obvious to combine a phthalocyanine such as Pigment Blue 15 with the phosphorous acid fungicide. With respect to Collins not listing phthalocyanine as a synergist for the phosphorous acid fungicide, the Appellants while making claim to such synergism provides no evidence to support or convince one that the phthalocyanine has a synergistic effect on the phosphorous acid fungicide. Furthermore, the Examiner argues that Collins at column 1 lines 20-30 discloses

Art Unit: 1616

conventional knowledge of using phosphorous acid and salts thereof and its monoesters as actives against plant fungal disease. The further disclosure of its pesticidal effects is a teaching or suggestion toward substituting the instantly disclaimed mancozeb for another fungicide such as a phosphorous fungicide compound.

Appellants' synergistic argument to the teaching away of removing synergistic antifungal phosphorous monoesters and bithiocarbamates such as mancozeb combination is not convincing since obviousness can be attained for a less preferred embodiment.

According to Collins, there is an added motivation toward substituting mancozeb with a fungicide that will keep away pest (abstract). In addition, Collins alone teaches a composition comprising instant phosphorous components (abstract). Collins also teaches that the composition can contain dyes such as Pigment blue (column 12 lines 10-22). Such teaching yields a composition comprising instant phosphorous compounds plus pigment blue. Collins also teaches that the composition possess plant fungicidal activity (column 1 lines 20-26). Collins teaches a method of applying the composition to plant foliage (column 4 line 10 – column 7 line 7). Such application method would result in the control of plant fungal disease. The Examiner is stating that Lucas '661 teaches an invention comprising ALIETTE™ + FORE™ which equals mancozeb + phthalocyanine dye (Pigment Blue 15) + phosphorous acid fungicide (fosetyl-Al).

Appellants have yet to show that the combination of only phthalocyanine dye (Pigment Blue 15) + phosphorous acid fungicide (fosetyl-Al) yield synergistic fungicidal activity.

Also, nowhere in Mudge '804 is it stated or suggested that turf quality or turf color is a result of fungi control. Appellants argue that it would not have been obvious to combine

Art Unit: 1616

Lucas '661 and Collins '228 since Lucas is to the control of fungi and Collins is to the control of pests such as arthropods. The Examiner argues that Collins' invention like Lucas' invention also possesses fungicidal activity (Collins' column 1 lines 20-26). For this reason it is obvious to combine Lucas and Collins. In addition, Collins alone teaches a composition comprising instant phosphorous components (abstract). Collins also teaches that the composition can contain dyes such as Pigment blue (column 12 lines 10-22). Such teaching yields a composition comprising instant phosphorous compounds plus pigment blue. Collins also teaches that the composition possess plant fungicidal activity (column 1 lines 20-26). Collins teaches a method of applying the composition to plant foliage (column 4 line 10 – column 7 line 7). Such application method would result in the control of plant fungal disease.

The Appellants argue that the Examiner erred in finding mancozeb and phosphorous acid and metal salts thereof to have analogous fungicidal properties making them interchangeable. See pages 33-35.

The Examiner maintains that an artisan in the field at the time of applicant's invention would have been motivated to modify the Lucas reference turf treating composition containing mancozeb to substitute the Collins reference phosphorous acid or alkali/alkaline earth metal salt thereof since the references individually are drawn to fungal control. Since both references teach the same functional utility, it would have been obvious to modify the Lucas '661 composition containing mancozeb to substitute the Collins' phosphorous acid or alkali/alkaline earth metal salt thereof. The fact that both Collins and Lucas teach fungi control makes them analogous. The Examiner believes that no one in the fungicide field would want to combine two fungicides that

Art Unit: 1616

function exactly the same. It appears to be no benefit in making such a combination.

Typically, two actives are combined to broaden the activity scope and/or increase the effectiveness or potency.

Appellants argue that Lucas' invention differs from the instant claims in that it fails to teach: 1) the substitution of antifungal agent mancozeb with the phosphorous acid or alkali/alkaline earth metal salt thereof. Note, the instant claims exclude mancozeb; 2) the substitution of Pigment Blue 15 with a different phthalocyanine compound. The Examiner's assertion to remove mancozeb from the FORE/ALIETTE™ contradicts Lucas' teaching which describes the combination of mancozeb plus the monoester salt of phosphorous acid to be critical and to yield a synergistic combination. See Appeal Brief pages 35-36.

The Examiner maintains that an artisan in the field at the time of applicant's invention would have been motivated to modify the Lucas reference turf treating composition containing mancozeb to substitute the Collins reference phosphorous acid or alkali/alkaline earth metal salt thereof since both references individually are drawn to fungal control. Since both references teach the same functional utility, it would have been obvious to modify the Lucas '661 composition containing mancozeb to substitute the Collins' phosphorous acid or alkali/alkaline earth metal salt thereof. Collins additionally teaches, interchangeably, the further incorporation of various colorants into its plant treatment formulations including metal phthalocyanine dyestuffs. See col. 12, especially lines 10-22. Collins provides motivation to one of ordinary skill in the art to substitute one functionally equivalent phthalocyanine compound for another, i.e. substitute the use of Pigment Blue 15 with a different phthalocyanine dye compound. Thus, it would have been prima facie obvious to one of ordinary skill in the art at the time of filing of the instant claimed invention to substitute the Lucas' mancozeb fungicide with the Collins phosphorous acid or alkali/alkaline earth metal salt thereof

Art Unit: 1616

fungicide for added pesticide resistance as taught by Collins and where necessary substitute a different phthalocyanine dye for Pigment Blue 15 in the Lucas composition to attain analogous colorant properties as taught by Collins.

The Appellants argue that the “consisting essentially of” language in the instant claims would exclude the inclusion of monoester salt of phosphorous acid. See pages 36-37 of Appeal Brief.

The Examiner argues that instant claims are drawn to a fungicidal invention. The monoester salt of phosphorous acid functions as a fungicide as taught in Collins. Therefore, the modification of the instant invention to include the monoester salt of phosphorous acid would not materially change the function of the instant invention. Since instant invention will function as a fungicide with or without the addition of Collins’ phosphorous acid fungicide, the “consisting essentially of” language recited in the instant claims does not exclude the Collins’ phosphorous acid or alkali/alkaline earth metal salt thereof.

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1-8,10-17,20-35,37,38 are rejected under 35 U.S.C. 103(a) as being unpatentable over Guillino et al. (Chemical control of dollar spot and brown patch of turfgrass in Italy, Mededelingen - Faculteit Landbouwkundige en Toegepaste Biologische Wetenschappen, Universiteit Gent, 1995, 60, 2b Proceedings, 47th International Symposium on Crop Protection, pt. 2, 1995, 367-70), Fenn et al (Phytopathology, 74 (5), pp. 606-611), Kato et al. (JP 02138376; 5/28/06) and Nagashima et al. (JP 03221576; 9/30/91).

Art Unit: 1616

Applicant's claims are drawn to a synergistic fungicidal composition comprising a monoester salt of a phosphorous acid or phosphorous acid or alkali or alkali earth metal salt thereof plus a phthalocyanine compound such as Pigment Blue 15. Applicant's claims are also drawn to a method of applying said composition to turfgrass to combat fungi growth and enhance turfgrass quality.

Guillino et al. teach that the fungus *Rhizotonia solani* causes brown patches in turfgrass, such as, bentgrass and bermudagrass (page 367 summary section and pp. 368-9 result section). Guillino et al. do not teach that the phosphorous compounds in claims 1,10-14,22-25,31 and 32 are used to combat *Rhizotonia solani* in turfgrass. However, Fenn et al. teach that phosphorous acid and fosetyl-Al are fungicides used to control *Rhizotonia solani* (pages 609-610 discussion section). It would have been obvious to apply phosphorous acid or fosetyl-Al to the turfgrass recited in claims 1,6,7,29,30 to kill *Rhizotonia solani*. Neither Guillino et al. nor Fenn et al. teach the use of a phthalocyanine compound such as pigment blue 15 listed in claims 2-5,8,10,15-17,22-28,31-35. However, Kato et al. teach that green dye can be applied to brown dead lawn areas in golf courses (turfgrass) to restore the desired green appearance to golf courses (page 2). Nagashima et al. teach that a pigment blue 15 colorant can be added to dead grass to restore the color of grass (pages 8-9). It would have been obvious to one having ordinary skill in the art to add pigment blue 15 to phosphorous acid or fosetyl-Al. One would have been motivated to do this because while phosphorous acid or fosetyl-Al would control/kill the fungus, *Rhizotonia solani*,

Art Unit: 1616

responsible for causing brown or dead spots in the turfgrass (golf course), the pigment blue 15 would restore the desired green appearance to turfgrass.

The combination of references excludes an ethylenebisdithiocarbamate contact fungicide recited in claims 1,10,24 and 32 which is a requirement of the present claims. With respect to the instant amount of phthalocyanine and fosetyl-Al or phosphorous acid, one having ordinary skill in the art would have been able to determine the optimum amount of phthalocyanine and fosetyl-Al or phosphorous acid. One would have been motivated to do this in order to make a composition that would have been most effective in controlling fungal growth and restoring color without destroying the turfgrass. With respect to the physical form of the composition recited in claims 20,21,37 and 38, one would have expected all physical forms of the actives to be effective absent a showing of unexpected results. With respect to the term "synergistic" used in the claims to describe the combined activity of said phthalocyanine and fosetyl-Al or phosphorous compound, the Examiner would like to point out that all of the examples in the specification and declarations showing synergism include mancozeb. The Examiner further points out that Applicant does not provide examples showing synergism for a combination comprising only phosphorous acid or fosetyl-Al plus a phthalocyanine lacking the fungicide (mancozeb). The claims are not commensurate in scope with the examples provided in the declarations.

(10) Response to Argument

Appellants argue that Kato and Nagashima are not combinable with Guillino and Fenn. Kato and Nagashima are to coloring brown or dead grass with a pigment plus resin binder to improve grass color, whereas Guillino and Fenn are to controlling fungal disease in the grass by making use of a fungicide.

The Examiner maintains that it would have been obvious to combine the inventions, because one would have desired that the grass possess a beautiful green appearance by applying thereto Kato's and Nagashima's phthalocyanine containing compositions while the fungicides of Guillino and Fenn are being applied simultaneously to the dead grass to control the fungal disease. The Examiner argues that the combination of references do not disclose that the dye and phosphorous compound yield synergism. The Examiner argues that instant specification shows only synergistic results for compositions comprising mancozeb plus instant phosphorous compounds plus instant phthalocyanine compounds. Applicants provide no evidence that the resin binder of Kato and Nagashima would prevent the growth of the grass by inhibiting photosynthesis.

Applicants argue that Kato and Nagashima teach the combination of a colorant (e.g. Pigment Blue 15) and a resin. The resin binds the colorant to dead grass to improve grass color. Kato's and Nagashima's composition would have little usefulness if applied to live grass that requires cutting.

The Examiner argues that regardless of the resin present in Kato's and Nagashima's composition, an artisan in the field would have been motivated to modify Fenn's and Guillino's inventions to include the colorant taught by Kato and Nagashima. The artisan would have been motivated to do this in order to arrive at an invention that would control fungi infestation in the grass while at the same time grant an attractive greenish color to the grass during the healing process. The cutting of the grass is insignificant. The modified invention would heal the grass and bring forth a beautiful color to the grass whenever the grass is treated. It would not have been necessary to

Art Unit: 1616

carry over Kato's and Nagashima's resin to the modified invention of Fenn and Guillino since Kato and Nagashima are primarily used in the rejection for the teaching that dyes therein are employed to bring green color to grass. Hence, the systemic effect of the fungicide would not be hindered. The invention derived from the combination of the 4 references would yield a fungicidal composition capable of improving turfgrass color and turfgrass quality.

(11) Related Proceeding(s) Appendix

The following are the related appeals, interferences, and judicial proceedings known to the examiner which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal:

Bayer CropScience LP v. Tessenderlo Kerley, Inc. and Phoenix Environmental Care, LLC. Civil Action No.: 1:09-cv-833.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Alton N. Pryor/

Primary Examiner, Art Unit 1616

Conferees:

/Bennett Celsa/

Primary Examiner

/Johann R. Richter/

Supervisory Patent Examiner, Art Unit 1616

Application/Control Number: 10/849,509
Art Unit: 1616

Page 19